RHB Bank Bhd v Alom Industries Sdn Bhd

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–53 OF 2006-II
HAMID SULTAN JC
25 APRIL 2007

Land Law — Charge — Enforcement of — Statutory sale on a charge action — Chargor alleged breach of loan agreement terms — Order for sale a discretionary relief vested on the court to exercise — Sarawak Land Code (Cap 81), s 148

The defendant's property is charged to the plaintiff pursuant to Sarawak Land Code ('SLC') for finance facilities advanced by the plaintiff to a third party borrower. The plaintiff by this originating summons is seeking a prayer, inter alia, to sell by public auction the property of the defendant charged to the plaintiff. The defendant alleged that it was a fundamental term of the letter of offer and the said loan agreement that the plaintiff was to grant to the borrower, inter alia, an overdraft facility up to a principal sum of RM1,500,000. It is the plaintiff's case that the overdraft drawing limit in the principal sum of RM1,500,000 had been exceeded. However, the defendant says that the plaintiff's allegation is without basis on the ground that clause 4.3 of the said loan agreement provided expressly that for the purpose of ascertaining whether the limit of the principal sum of the said overdraft facility has been exceeded or not, all accumulated and capitalized interests shall be deemed to be interest and not principal sum.

Held:

(1) In a statutory sale on a charge action, the chargee is not attempting to sue for the debt the borrower owes but he is only exercising his statutory remedy against the chargor. In consequence, the defence of the chargor that the claim is excessive or in breach of the terms of the charge must be mounted by a separate action against the chargee and cannot generally be raised to defeat the chargee's application for sale. This is so because the charge action is an action in rem ie against the property per se and not an action in personam to settle issues relating to the debt (see para 8).

(2) The purpose of a sale under s 148 of the Land Code (Cap 81), the court can consider whether the conduct of the plaintiff was just, otherwise an order for sale can be refused. In that sense, an order for sale of property under SLC is not a statutory right to the chargee but is a discretionary relief vested on the court to exercise in the event it is just. The test will be that once the defendant places prima facie facts to satisfy the court, the conduct of the plaintiff is unjust and is not within the letter, interest and spirit of the charge document, it is necessary for the chargee to satisfy the court that the decision to recall for the

facility and proceed with the sale was necessary and expedient to protect the chargee's interest on the circumstance of the case (see para 9).

Obiter:

The powers vested in the courts to refuse an order for sale under SLC is much wider than that given under the National Land Code 1965 ('Code'). For, under the Code, an order for sale is almost always granted if all statutory and procedural requirements are duly complied with, unless the chargor can satisfy the court of the existence of cause to the contrary. However, under the SLC, to some extent the law enables the court to subject the exercise of the legal rights of the chargee to equitable considerations; considerations that is of a personal character arising between one individual and another which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way (see para 11).

[Bahasa Malaysia summary

Hartanah defendan telah digadaikan kepada plaintif menurut Kanun Tanah Sarawak ('KTS') untuk kemudahan kewangan yang diberikan oleh plaintif kepada peminjam pihak ketiga. Plaintif melalui Saman Pemula ini memohon, antara yang lain, untuk menjual secara lelongan awam hartanah defendan yang dicajkan kepada plaintif. Defendan mengatakan bahawa ia adalah terma asasi surat tawaran dan perjanjian pinjaman tersebut bahawa plaintif akan memberikan kepada peminjam, antara yang lain, satu kemudahan overdraf sehingga jumlah wang prinsipal sebanyak RM1,500,000. Ia adalah kes plaintif bahawa had pengeluaran overdraf di dalam jumlah wang prinsipal sebanyak RM1,500,000 telah melebihi had. Akan tetapi, defendan menyatakan bahawa dakwaan plaintif adalah tanpa dasar atas alasan bahawa klausa 4.3 perjanjian pinjaman memperuntukkan secara nyata bahawa untuk tujuan mengenalpasti sama ada had jumlah wang prinsipal kemudahan overdraf tersebut telah melebihi atau tidak, kesemua faedah-faedah yang dikumpul dan dijadikan permodalan akan dianggap sebagai faedah dan bukannya jumlah wang prinsipal.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Dalam satu penjualan statutori atas satu tindakan gadaian, pemegang gadaian bukannya cuba untuk menyaman atas hutang yang peminjam berhutang tetapi beliau hanya menggunakan remedi statutorinya terhadap penggadai. Dengan itu, pembelaan penggadai bahawa tuntutan tersebut adalah melampau atau memungkiri terma-terma gadaian tersebut seharusnya memulakan satu tindakan yang berasingan terhadap penggadai dan tidak boleh secara am dibangkitkan untuk mengalahkan permohonan pemegang gadaian untuk jualan. Ini adalah kerana satu tindakan gadaian adalah satu tindakan in rem iaitu terhadap hartanah per se dan bukannya satu tindakan in personam untuk menyelesaikan isu-isu berhubungan dengan hutang tersebut (lihat perenggan 8).

(2) Tujuan satu jualan di bawah s 148 Kanun Tanah (Cap 81), mahkamah dapat mempertimbangkan sama ada kelakuan plaintif adalah adil, sekiranya tidak, satu perintah jualan dapat ditolak. Dalam erti kata yang sebenarnya, satu

perintah untuk jualan hartanah di bawah KTS bukannya satu hak statutori pemegang gadaian tetapi satu relif mengikut budi bicara yang diletak pada mahkamah untuk menggunakannya jika ia adalah adil. Ujian ialah apabila defendan menggunakan fakta-fakta prima facie yang memuaskan hati mahkamah, kelakuan plaintif adalah tidak adil dan tidak mengikut peraturan, kepentingan dan semangat dokumen gadaian, adalah perlu untuk pemegang gadaian memuaskan hati mahkamah bahawa keputusan untuk menarik balik fasiliti tersebut dan meneruskan dengan jualan adalah perlu dan wajar untuk melindungi kepentingan pemegang gadaian dalam keadaan sesuatu kes. (lihat perenggan 9).

Obiter:

Kuasa yang diberikan kepada mahkamah-mahkamah untuk menolak satu perintah jualan di bawah KTS adalah lebih luas daripada yang diberikan di bawah Kanun Tanah Negara 1965 ('Kanun tersebut'). Oleh kerana, di bawah Kanun tersebut, satu perintah jualan semestinya selalu diberikan sekiranya kesemua keperluan-keperluan statutori dan prosedur telah diikuti, kecuali penggadai dapat memuaskan hati mahkamah akan kewujudan kausa yang bertentangan. Akan tetapi, di bawah KTS, di suatu tahap undang-undang mahkamah dibenarkan mentaklukkan pelaksanaan hak-hak perundangan pemegang gadaian kepada pertimbangan-pertimbangan ekuiti; pertimbangan-pertimbangan yang berciri peribadi di antara satu individu dan satu yang lain yang dapat menjadikan ia tidak adil, atau tidak berekuiti, untuk menegaskan hak-hak perundangan atau melaksanakannya dalam cara tertentu (lihat perenggan 11).]

Notes

For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2382.

For cases on overdraft facility, see 1*Mallal's Digest* (4th Ed, 2005 Reissue) paras 2000–2011.

Cases referred to

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 (refd)

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675 (refd)

Citibank NA v Jong Tze Khiok & Anor [1993] 3 MLJ 449 (refd)

Ebrahimi v Westbourne Galleries Ltd & Ors [1973] AC 360 (refd)

Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal [1991] 3 MLJ 163 (refd)

Lee Chong Lim v Standard Chartered Bank Malaysia Berhad [2004] 5 AMR 108 (refd)

Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors [2001] 6 MLJ 223 (refd)

Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (in receivership) [1996] 2 MLJ 461 (distd)

Univein Sdn Bhd v Malaysia Building Society Bhd [2003] 4 MLJ 618 (refd)

Legislation referred to

Contracts Act 1950 s 75
Co-operative Societies Act 1948
National Land Code 1965
Rules of the High Court 1980 O 83
Sarawak Land Code s 148(2)

Grace Yong (Ee & Lim Advocates) for the plaintiff.
Daisy Tham (Tham & Co) for the defendant.

Hamid Sultan JC:

[1] The defendant's property is charged to the plaintiff pursuant to Sarawak Land Code ('SLC') for finance facilities advanced by the plaintiff to a third party borrower. The plaintiff by this Originating Summons is seeking a prayer, inter alia, to sell by public auction the property of the defendant charged to the plaintiff.

[2] The defendant executed the said charge in favour of the plaintiff as security and in consideration of the plaintiff granting to Alom Building Systems Sdn Bhd ('the borrower') overdraft ('OD') and trade facilities up to an aggregate principal sum of RM5,000,000 which was also subject to the terms and conditions contained in the letters of offer by the plaintiff to the borrower dated 2 April 2002 and 27 April 2002 and loan agreement entered between the plaintiff and the borrower dated 22 May 2002 in addition to the terms and conditions contained in the said charge.

[3] The said charge provides, inter alia:

(a) that the plaintiff shall be entitled to charge:

(i) interest on the OD facility at the rate of 1.5% above the plaintiff's base lending rate ('BLR') per annum, calculated with monthly rest such interest to be payable monthly in arrears and shall without notice be debited accordingly to the defendant's OD account and capitalized at the end of each calendar month and added for all purposes to the principal sum then owing;

(ii) in respect of the trade facility by way of banker's acceptance ('BA') acceptance commission of 1.5% per annum; and

upon default in payment of the monies due and outstanding to the plaintiff, the plaintiff is entitled to claim damages by way of additional interest of 3.5% per annum above the plaintiff's BLR on the total amount due and outstanding, calculated with monthly rests from the due date until full payment thereof by the borrower and/or the defendant/chargor The plaintiff's BLR up until the date of filing of the application ie 23 February 2006, was 6.25% per annum. On 24 February 2006, the plaintiff's BLR was revised up to 6.5% per annum.

(b) that the borrower shall, amongst other things, operate the OD facility and the BA facility to the plaintiff's satisfaction and or within the maximum extent stipulated and further shall effect full payment of all moneys due

thereon upon demand, failing which the plaintiff shall be entitled to terminate performance and seek recovery of all such moneys owing thereunder.

(c) the tenor of the borrower's trade facilities shall be up to a maximum of one hundred and eighty (180) days.

(d) the OD facility was conducted by the borrower in an unsatisfactory manner and in excess of the approved drawing limit of RM1,5000,000 due to the borrower's failure to pay the accumulated interest charged thereto. The BA facility had also fallen due and was outstanding. Despite repeated demands, neither the borrower, nor the defendant remedied the defaults.

(e) the borrower allowed another event of default to occur when a winding up petition was presented against it in the High Court at Kuching under Companies (Winding Up) No 28-13-04-I on the petition of HSBC Bank Malaysia Berhad. By letter dated 28 February 2005, the plaintiff recalled the facilities and demanded repayment of all and the whole of the monies due to the plaintiff under the OD and the BA facilities. The total sum demanded was RM4,112,537.33 due as at 31 January 2005 with interest still accruing from 1 February 2005 until final payment at the rate of 3.5% above the plaintiff's BLR, then at 6.0%.

(f) the defendant failed to repay the sum as demanded. A letter of demand dated 1 March 2005 was also issued to the defendant as chargor.

(g) the defendant failed to pay as demanded and the plaintiff issued a notice of remedy dated 21 March 2005, pursuant to the SLC read with the said charge and the application was filed by the plaintiff to sell the charged land pursuant to s 148(2)(c) of SLC.

[4] The defendant in opposing the plaintiff's application, inter alia, in the affidavit says as follows:

(a) it was a fundamental term of the letters of offer, the said loan agreement and the said charge that the plaintiff was to grant to the borrower, the facilities agreed, inter alia:

(i) an overdraft facility up to a principal sum of RM1,500,000. For purpose of ascertaining whether the limit of the said overdraft facility has been exceeded or not, all accumulated and capitalized interests shall be deemed to be interest and not principal sum.

(ii) bankers' acceptance facility with a tenor of not less than 180 days.

(b) the borrower has operated the overdraft facility within the principal sum of RM1,500,000. In particular, the borrower did not and has not made any drawing on the principal sum of the overdraft facility over and above the said drawing limit of RM1,500,000.

(c) in breach of the terms and conditions of the letters of offer, the said loan agreement and the said charge, the plaintiff had wrongly claimed that the

overdraft drawing limit in the principal sum of RM1,500,000 had been exceeded and had wrongfully and illegally charged default interest on the alleged excess amounts.

(d) in further breach the plaintiff failed, refused and/or neglected to accept the bankers' acceptance drawn by the borrower at a tenor of at least 180 days. Instead, the plaintiff only accepted the bankers' acceptance drawn by the borrower at tenor of less than 180 days. The plaintiff also unlawfully charged the borrower acceptance commission at exorbitant rates which exceeded the agreed rate of 1.5% per annum.

(e) the aforesaid wrongful acts on the part of the plaintiff tantamount to a fundamental breach of the terms and conditions of the letters of offer, the said loan agreement and the said charge, therefore disentitling the plaintiff to any claim whatsoever. The plaintiff's aforesaid acts have also pre-empted the borrower and the defendant from performing their part of the agreement.

(f) upon becoming aware of the winding up petition which was presented by HSBC Bank Malaysia Berhad, the borrower immediately took steps to settle the amount due and owing to HSBC Bank Malaysia Berhad. This resulted in HSBC Bank Malaysia Berhad withdrawing its winding-up petition against the borrower on 10 March 2005, that is prior to the filing of this action. The plaintiff was at all material times fully aware of the said discontinuance of the winding up petition by HSBC Bank Malaysia Berhad.

(g) in the circumstances, there was no cogent reason for the plaintiff to recall the overdraft and banker's acceptance facilities or to issue the purported letter of demand dated 1 March 2005 or the notice to remedy dated 21 March 2005. The plaintiff's conduct in doing so constituted a fundamental breach of the terms and conditions of the letters of offer, the said loan agreement and the said charge. The wrongful and unlawful termination and recall of the overdraft and banker's acceptance facilities by the plaintiff has severely jeorpardised the borrower's financial position and rendered it impossible for the borrower to carry on business.

(h) an order for sale of the said property is premature and bad in law in that the purported letter of demand dated 1 March 2005 and the purported notice to remedy dated 21 March 2005 do not comply with the terms of the said charge and are therefore unlawful.

(i) the certificate of indebtedness issued by the plaintiff is incorrect and the figures given do not compute for the reasons stated in the following paragraphs.

(j) it is very clear from the plaintiff's bank statements that the borrower had made numerous repayments to the plaintiff which were credited to the overdraft account. Further, the alleged principal amount due under the overdraft account as stated in the certificate of indebtedness actually includes interest and capitalized interest.

(k) the plaintiff is not entitled to charge interest at the rate as claimed in the said certificate of indebtedness for the following reasons:

(i) pursuant to the letters of offer, the said loan agreement and the said charge, the plaintiff is only entitled to charge interest on the overdraft facility at the rate of 1.5% per annum above the plaintiff's base lending rate with monthly rest.

(ii) interest at the rate of 3.5% per annum above the plaintiff's base lending rate on monthly rest is only chargeable upon default.

(l) the borrower has at all material times maintained the overdraft facility account within the approved principal limit of RM1,500,000. There is therefore no default on the part of the borrower.

(m) the interest charged by the plaintiff has been unilaterally and unlawfully varied without the knowledge of the defendants.

(n) in further dispute of the said certificate of indebtedness, and in respect of the bankers acceptance facility, the plaintiff is not entitled to charge interest at the rate as claimed in the said certificate of indebtedness on the following reasons:

(i) pursuant to the letters of offer, the said loan agreement and the said charge, the plaintiff is only entitled to charge acceptance commission on the banker's acceptance facility at the rate of 1.5% per annum.

(ii) the plaintiff has unlawfully charged interest at the default rate on or before the maturity of and/or before the expiry of the 180 days from the acceptance of the respective bankers acceptance.

(o) neither the borrower nor the defendant received any proper notices on variations of interest rate before the new rates were imposed on the overdraft facility and/or banker's acceptance facility.

(p) the provision enabling the plaintiff to charge 3.5% per annum above the plaintiff's base lending rate upon default did not represent the actual loss suffered by the plaintiff resulting from the defendant's alleged default (which is denied). The said provision amounts to a penalty clause within the meaning of s 75 of the Contracts Act 1950 ('CA 1950'). The plaintiff ought not to be permitted to enforce such a clause in violation of the said provision of the CA 1950.

(q) the plaintiff would not be able to adequately compensate the defendant by damages. The said property is a large piece of industrial land centrally located in Kuching at the Sama Jaya Industrial Zone. The said property houses an office cum factory building specially designed and built for the use of the defendant and its various related companies. As such, the said property is irreplaceable to the defendant and its various companies.

(r) the plaintiff would not be prejudiced if order for sale is not granted. The said property would still remain charged to the plaintiff, and the defendant has no way of dealing with it.

[5] The plaintiff had given an appropriate reply to the said affidavit which I think is not necessary for me to set out except that the plaintiff says the demand has been made to the chargor/defendant to pay the outstanding moneys secured by the charge. The chargor/defendant defaulted and therefore it shall be lawful for the

chargee/plaintiff to obtain an order for sale of the charged land in accordance with the provisions of the charge, the SLC and the rules of court.

[6] The defendant inter alia submits as follows:

(a) in Sarawak, the law in relation to an application for an order for sale of charged land is governed by s 148 of the SLC. Section 148 provides as follows:

> 148(1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied.
>
> (2) If the Chargor fails to comply with the requirements of any notice lawfully given, the Chargee shall be at liberty to apply to the High Court:
>
> (a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;
>
> (b) to receive the rents and profits of the charged land; or
>
> (c) for the sale of the charged land.

(b) in *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 3 MLJ 163, the Supreme Court held that the power to grant an order for sale under s 148 of the SLC is discretionary as the Court has to be satisfied that it seems just in the circumstances to make the order. In that case, it was held that the chargee therein has not shown that circumstances seemed just for it to seek the order for a sale and the Supreme Court set aside the order for sale.

(c) an application for an order for sale of charged property must comply with O 83 of the Rules of the High Court 1980 and also s 148(2) of the SLC. Therefore, the provisions of the SLC, and the terms of the charge document, have to be examined to determine the chargee's right to apply for an order for sale.

(d) under s 148 of the SLC, a condition precedent to an action under O 83 for sale of charged land is the defendant's failure to comply with the requirements of a notice in writing given by the plaintiff requiring it to remedy a default made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in the charge and will rely on the Supreme Court case of *Citibank NA v Jong Tze Khiok & Anor* [1993] 3 MLJ 449, Jemuri Serjan CJ (Borneo), while delivering the grounds of judgment of the Supreme Court, addressed this area of law succinctly and stated:

> It is not appropriate to draw an analogy between actions in charges and guarantees, as the latter is governed by contract law where a demand is a condition precedent to a suit to claim monies lent.
>
> A chargee's right to issue a written notice of demand is triggered by the default of payment by the chargor and not by the demand for payment under Clause 1. The purpose of the written notice of demand is not to demand payment, but to notify the chargor that unless the default was remedied, the chargee would resort to s 148(2)(c) of the Code for an order for sale. The chargee can only apply for such an order for sale if the chargor fails to comply with the notice.

An application for an order for sale of charged property under O 83 of the Rules of the High Court 1980 ('RHC') is derived from s 148(2) of the Code. Therefore, the provisions of the Code, and the terms of the charge document, have to be examined to determine the chargee's right to apply for an order of sale.

(e) it is the defendant's contention that the borrower and the defendant have not defaulted under the loan agreement and the memorandum of charge respectively. As such, the plaintiff has no right to issue section 148 notice to the defendant.

(f) it was a fundamental term of the letter of offer and the said loan agreement that the plaintiff was to grant to the borrower, inter alia, an overdraft facility up to a principal sum of RM1,500,000. It is the plaintiff's case that the overdraft drawing limit in the principal sum of RM1,500,000 had been exceeded. However, the defendant says that the plaintiff's allegation is without basis on the ground that clause 4.3 of the said loan agreement provided expressly that for the purpose of ascertaining whether the limit of the principal sum of the said overdraft facility has been exceeded or not, all accumulated and capitalized interests shall be deemed to be interest and not principal sum.

(g) the evidence adduced by the defendant shows that at all material times, the borrower has operated the overdraft facility within the principal sum of RM1,500,000. In particular, the borrower did not and has not made any drawing on the principal sum of the overdraft facility over and above the said drawing limit of RM1,500,000. For example, the respective principal sums drawn by the borrower as at the following dates were as estimated as at: (i) 31 January 2004 less than RM1,323,264.50; (ii) 28 February 2004 less than RM1,450,547.65; (iii) 31 March 2004 less than RM1,468,985.40; (iv) 30 April 2004 less than RM1,472,167.70; (v) 31 May 2004 less than RM1,469,178.60; (vi) 30 June 2004 less than RM1,455,265.50. From July, 2004 onwards, the borrower did not make any further drawing on the principal sum. The difference between the outstanding principal sums and the statement of account balances wholly consisted of interest charges.

(h) in the circumstances stated above, the borrower did not exceed the approved drawing limit of the OD granted by the plaintiff. In the absence of default on the part of the borrower, the plaintiff was not entitled to recall the overdraft facility and was under an obligation to continue to extend the banking facilities to the borrower. The plaintiff had wrongly claimed that the overdraft drawing limit in the principal sum of RM1,500,000 had been exceeded and had wrongfully and illegally charged default interest on the alleged excess amounts.

(i) the defendant has adduced evidence to show that upon becoming aware of the winding up petition which was presented by HSBC Bank Malaysia Berhad, the borrower had immediately taken steps to settle the amount due and owing to HSBC Bank Malaysia Berhad. This resulted in HSBC Bank Malaysia Berhad withdrawing its winding-up petition against the borrower on 10 March 2005, that is prior to the notice to remedy dated 21 March 2005 and definitely prior to the filing of this action. The plaintiff was at all material times fully aware of the said discontinuance of the winding-up petition by HSBC Bank Malaysia Berhad.

(j) as there was no default on the part of the borrower and/or the defendant (in respect of the facilities) and as the winding up presented by HSBC Bank Malaysia Berhad complained of by the plaintiff has been remedied within 14 days of the letter of demand, it follows therefore that the plaintiff has no right to issue the notice to remedy, pursuant to s 148 of the SLC. The alleged notice to remedy made by the plaintiff against the defendant was therefore baseless, frivolous, vexatious and unlawful. In the premises, the plaintiff's application for an order for sale of the defendant's property is premature and bad in law.

(k) the plaintiff's application herein must be refused for the following reasons: (i) fundamental breaches of loan agreement by the plaintiff; (ii) plaintiff's incorrect and excessive claim; (iii) interest charged amounts to a penalty;

(i) in the case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76, the Supreme Court held that the bank was not entitled to recall the facilities purely on ground that the interest had not been serviced by the defendant and the bank, in recalling the loan mid-term, had committed a breach of the agreement which enable the defendant to claim damages from the plaintiff.

(ii) in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675, the Court of Appeal held that a party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of a contract.

(iii) in the case of *Lee Chong Lim v Standard Chartered Bank Malaysia Berhad* [2004] 5 AMR 108, the bank, vide a letter of offer read with a facilities agreement, agreed to provide the borrower with a term loan but subsequently withdrew the facility due to the alleged falsity of the documents supplied by the borrower in support of his loan application. The bank relied on section 4.04 of the facilities agreement (which provided that the bank was under no obligation to make or continue to make available any of the facilities to the borrower) and section 7.01(a) (which provided that the bank had the absolute right and discretion to demand repayment of the facilities at any time). The court held that the bank had an obligation to provide the loan and was duty bound to complete its obligations to disburse the loan under the agreement before it was competent to invoke sections 4.04 and 7.01(a). The court further held that to allow the bank to break the contract without incurring liability would be repugnant to the law of contract.

(l) applying the principles of the above authorities to the present case, it is clear that the plaintiff is in breach of its obligations to provide the banking facilities to the borrower in accordance with the terms and conditions agreed by the parties.

(m) in the circumstances, the defendant contends that the plaintiff has no right to recall the overdraft and bankers acceptance facilities or to issue the purported letter of demand dated 1 March 2005 or the notice to remedy dated 21 March 2005. The plaintiff's conduct in doing so constituted a fundamental breach of the terms and conditions of the letters of offer, the said loan agreement and the

said charge. The wrongful and unlawful termination and recall of the overdraft and bankers acceptance facilities by the plaintiff has severely jeorpardised the borrower's financial position and rendered it impossible for the borrower to carry on business.

(n) the certificate of indebtedness issued by the plaintiff is incorrect and the figures given do not compute for the reasons stated in the following paragraphs.

(o) the provision enabling the plaintiff to charge 3.5% per annum above the plaintiff's base lending rate upon default did not represent the actual loss suffered by the plaintiff resulting from the defendant's alleged default (which is denied). The said provision amounts to a penalty clause within the meaning of section 75 of the CA 1950. The plaintiff ought not to be permitted to enforce such a clause in violation of the said provision of the CA 1950 and will rely on the case of (i) *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (in receivership)* [1996] 2 MLJ 461; and (ii) *Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors* [2001] 6 MLJ 223.

The plaintiff must prove actual loss and damage suffered by them in accordance with the settle rules. This can only be done by way of full trial, not by this originating summons.

[7] The plaintiff, inter alia, submits as follows:

(a) the plaintiff agrees with the law highlighted by learned counsel in the case of *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 3 MLJ 163 and the case of *Citibank NA v Jong Tze Khiok & Anor* [1993] 3 MLJ 449 and further submits that the plaintiff has satisfied all the prerequisites for filing this application for an order for sale and it is just in the present circumstances for an order for sale of the property to be granted.

(b) the plaintiff asserts that events of default have occurred giving rise to the plaintiff's rights to commence this foreclosure action against the defendant. The following five events of default under clause 53 of the charge have taken place:

(i) the borrower failed to pay the accumulated interest charged on the overdraft facility which was in excess of the approved drawing limit of RM1,500,000 as granted to the borrower by the plaintiff and this represents a default under clause 53(1) of the charge;

(ii) similarly under clause 53(1) of the charge, the chargor has defaulted in the payment of money payable to the plaintiff whether the outstanding sum was formally demanded or not;

(iii) under clause 53(3), the chargor also defaulted by failing to remedy the default within 14days after being notified of the default;

(iv) a winding up petition was also presented against it in the High Court at Kuching under Companies (Winding Up) No 28–13–04-I on the petition of HSBC Bank Malaysia Berhad and the winding-up petition is still pending against the borrower by the substituted petitioning creditor, Bank

Industri & Teknologi Malaysia Berhad, pursuant to an order dated 10 March 2005 and this represents a default under clause 53(7) of the charge; and

(v) under clause 53(2) of the charge, both the borrower and defendant has thereby defaulted by failing to observe and perform the agreement's and covenant's stipulated terms and conditions under the charge.

(c) in reply to paragraphs 4.8-4.12 of the defendant's submission, clause 4.3 of the loan agreement strictly in relation to the security provided by the defendant to secure the facility and therefore it is for the purpose of ascertaining whether the limit of the principal sum hereby secured under the charge has been exceeded or not and not for the purpose of ascertaining whether the limit of the principal sum of the OD facility, ie the approved drawing limit, has been exceeded or not as insinuated by the defendant. The plaintiff's position is clearer once clause 4.3 of the loan agreement is read with clause 5 of the charge. Therefore the plaintiff says that both principal and capitalized interest are taken into account when ascertaining whether the OD facility is within or in excess of its approved drawing limit of RM150,000.

(d) the plaintiff also says that the three authorities relied on by the defendant of the defendant's submission are irrelevant and may be distinguished from the present case based on their own set of facts.

(e) the plaintiff submits that section 75 does not preclude the plaintiff from claiming interest of 3.5% pa above the plaintiff's base lending rate which was a prescribed term agreed to by the defendant and the plaintiff as reflected in clause 4(iii) of the charge The case of *Realvest Properties Sdn Bhd v Cooperative Central Bank Ltd (in receivership)* [1996] 2 MLJ 461 is distinguished from the present case on its facts because in that case the 'bank' was not an ordinary commercial bank like the plaintiff but a co-operative society registered under the Co-operative Societies Act 1948. The chargeable interests were also out of the ordinary, harsh and exorbitant and therefore, the Federal Court rightly held that the default interest of 20% pa was void and unenforceable under section 75. This was so because this default interest was paid side by side with the interest calculated by the prescribed rate of interest of 14.5% pa on the same money lent or owed for the same span of time. In the present case, interest is only charged at the rate of 3.5% pa above the plaintiff's base lending rate on the outstanding sum due under the charge which the plaintiff submits is reasonable and ought to be enforced.

(f) furthermore, the indebtedness to the plaintiff is undeniable and monies secured by the charge remains outstanding and due with interests continually accruing until full and final settlement thereof. Moreover, the figures in the statements of account are not in dispute and when read together with the certificate of indebtedness, duly endorsed by the plaintiff's officer, shall be conclusive evidence as to the money and liabilities for the time being due or incurred to the plaintiff as at 23 February 2006 by the defendant. The delay in selling the said lands would not be in the interest of either parties because interest on the outstanding account will continue to accrue and the total outstanding will continue to increase to an amount that may already have

surpassed or might surpass the value of the property as the defendant is not making any payments whatsoever to reduce the outstanding account. In *Univein Sdn Bhd v Malaysia Building Society Bhd* [2003] 4 MLJ 618, Abdul Aziz JCA (delivering judgment of the Court of Appeal) held that (at p 622):

> It was obvious to me that the balance tilted heavily in favour of allowing the sale to proceed. From RM25,800,000 in 1995, the debt had now mounted to RM71,440,223.50. If the lands were not sold now, but sold only after the disposal of the appeal should the appellants fail in the appeal, with interest accruing daily at more than RM20,000 per day, the total outstanding would keep increasing to an amount that would depend on when the appeal would be decided. At RM20,000 per day, interest per year would come to a region of RM7m. The proceeds of sale of the lands would not pay even half of what the outstanding amount would be then. It would be worse if, depending on the economic situation then, the lands should fetch a lower value than their present market value. As to the balance, the respondents might not be able to recover it at all. The respondents should not be deprived of the fruit of their litigation. They should be allowed to recover now whatever amount they could from the lands. Apart from enabling them to enjoy some fruit from their litigation, that would reduce the amount of the interest that would otherwise keep accruing.

(g) the plaintiff is exercising its rights as provided for in the charge and prays that an order for sale in terms as prayed for in the originating summons be granted.

[8] To determine whether the order for sale ought to be allowed, I need to be satisfied that it is just on the facts of the case as it stands to allow the application. In doing so I must take into consideration the following:

(i) in a statutory sale on a charge action, the chargee is not attempting to sue for the debt the borrower owes but he is only exercising his statutory remedy against the chargor. In consequence, the defence of the chargor that the claim is excessive or in breach of the terms of the charge must be mounted by a separate action against the chargee and cannot generally be raised to defeat the chargee's application for sale. This is so because the charge action is an action in rem i.e. against the property per se and not an action in personam to settle issues relating to the debt.

(ii) the chargee must comply with all statutory as well as procedural requirements before the order for sale is granted. Any breach of the chargee in almost all cases will be strictly construed in favour of the chargor.

[9] The defendant says that there is a fundamental breach. In my view, I will not treat it as a fundamental breach as there is no provision under the charge whatsoever to say so. If there is a breach it may only amount to a breach entitling the defendant to claim damages and is not sufficient to defeat the statutory order for sale. However, for the purpose of a sale under s 148, the court can consider whether the conduct of the plaintiff was just, otherwise an order for sale can be refused. In that sense, an order for sale of property under SLC is not a statutory right to the chargee but is a discretionary relief vested on the court to exercise in the event it is just. In my view, the test will be that once the defendant places prima facie facts to satisfy the court, the conduct of the plaintiff is unjust and is not within the letter, interest and spirit

of the charge document, it is necessary for the chargee to satisfy the court that the decision to recall for the facility and proceed with the sale was necessary and expedient to protect the chargee's interest on the circumstance of the case.

[10] On the facts of this case, whatever breach the defendant complains of can be adequately dealt with in a personam action and it is frivolous, vexatious and abuse of process of court to raise it in a charge action when the defendant has defaulted in payment and is continuously in default. Also there is no evidence before the court to remedy the breach by payment of the sum due notwithstanding the time period for the breach has lapsed. In such circumstance, it will not be just not to allow an order for sale.

[11] The powers vested in the courts to refuse an order for sale under SLC is much wider than that given under the National Land Code 1965 ('Code'). For, under the Code, an order for sale is almost always granted if all statutory and procedural requirements are duly complied with, unless the chargor can satisfy the court of the existence of cause to the contrary. However, under the SLC, to some extent the law enables the court to subject the exercise of the legal rights of the chargee to equitable considerations; considerations that is of a personal character arising between one individual and another which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way as was advocated by Lord Wilberforce, in the decision of *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360 in a winding up petition on just and equitable grounds, and that phrase in my view will be equally be applicable to make such order as in the circumstance seems just as set out in s 148(3) of SLC.

[12] For reasons stated above, it is my judgment that the plaintiff's application must be allowed as prayed with costs and I hereby order so.

Plaintiff's application allowed with costs.

Reported by Sally Kee